the communications field before.[56] And, as the Supreme Court noted in Fullilove v. Klutznick, 448 U.S. 448 (1980), past congressional findings are an appropriate foundation on which to rest a minority preference regime.[57]

Moreover, acting under the broad authority delegated by Congress, the Commission has adduced additional evidence of minority underrepresentation in the communications field. CIRI itself has supplied data on the participation of minorities in the telecommunications industry and the need for measures to provide opportunity for entrepreneurial companies. CIRI encourages the Commission to review the evidence before it to determine if Congress' articulated purpose of promoting economic opportunity for minorities in the communications industry is sufficiently compelling to justify taking race into account. The results of the Commission's forthcoming Notice of Inquiry on discrimination in the telecommunications industry[58] could help the Commission ascertain whether the governmental interest in this instance is, indeed, compelling.

B. The Commission's Rules Are Narrowly Tailored to Further the Governmental Interest

The Commission's entrepreneurs' block rules also are narrowly tailored to further the government's interest in

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56. See, e.g., H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43, reprinted in 1982 U.S.C.C.A.N. 2261, 2287 (detailing congressional findings on the effects of past discrimination against minorities in the communications field).

57. Fullilove, 448 U.S. at 502-03 (Powell, J., concurring).

58. NPRM at ¶ 24.

promoting economic opportunity for minorities in the telecommunications industry. To establish narrow tailoring, courts generally hold that a race-conscious program (1) should be instituted after consideration of — or in conjunction with — race-neutral means of achieving the goal, (2) should set minority-utilization goals on a flexible, case-by-case basis rather than by a rigid quota system, and (3) should not present an unnecessary burden on nonminority third parties.[59] Each of these factors is met in the case of the Commission's Rules.

First, the Commission instituted the minority preference provisions in the F Block rules as part its broader entrepreneurs' block rules. The threshold test for participation in the entrepreneurs' blocks is based on an applicant's assets and revenues, not race. Moreover, the Commission adopted the race-conscious measures within the entrepreneurs' block rules after considering linking preferences to a Small Business Administration ("SBA") "disadvantage" test[60] and following the determination that "reserving blocks C and F for bidding by relatively small companies will not, by itself, be sufficient to ensure that small businesses and businesses owned by members of minority groups and women have the opportunity to obtain broadband PCS licenses."[61] In short, the Commission has

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59. Peightal, 26 F.3d at 1557; Coral Construction Co., 941 F.2d at 922.

60. See Second Report and Order, 9 FCC Rcd at 2400.

61. Fifth Report and Order, 9 FCC Rcd at 5538.

carefully examined and instituted race-neutral alternatives before enacting the preferences in the F Block rules.

Second, the Commission's F Block rules are flexible insofar as they do not provide preferences for minority-owned businesses that do not qualify for the entrepreneurs' block, nor guarantee licenses to those who do. In Croson, for example, one of the fatal flaws of the municipal contracting plan there was its rigid 30 percent minority quota for each prime contract. There was no account made for the possibility that there would not be sufficient minority-owned firms interested in the contract to fill the 30 percent requirement.

In the F Block rules, however, minority-owned firms that qualify to bid in the entrepreneurs' block are afforded only a bidding credit and an installment payment plan. No license is reserved for minority-owned firms, nor is any license set-aside for bidding only by minority-owned firms. If no minority-owned firms apply for the F Block auction, nonminority entrepreneurial businesses should win all of the licenses in that Block. In that regard, nonminority entrepreneurial businesses might win all of the F Block licenses even if several minority-owned firms apply for the auction. At bottom, the Commission's F Block minority preference provisions are flexible because they are available only to minority-owned companies that qualify as entrepreneurs and because they address only the lack of access to capital faced by minority businesses.

Finally, the Commission's F Block rules do not place an undue burden on other potential bidders. It is well-established that "[n]o constitutional defect necessarily arises from the disappointment of non-minorities asked to share the burden in curing the effects of past discrimination."[62] Rather, the critical examination is whether the race-conscious relief upsets settled rights and expectations.[63] Where settled rights or expectations are involved — as in promotions or firings — courts have held that the burden on individuals may be too great; where no settled rights or expectations are involved — as in hiring — courts conclude that individuals may be asked to shoulder that relatively "diffuse" burden of a race conscious program.[64]

In this case, there is no settled right or expectation at all. Auction participants possess no settled right to win a license and should have no reasonable expectation that they will. Moreover, reserving the F Block for entrepreneurial businesses in the first instance, and granting minority preferences within that entrepreneurs' block, does not deny nonminority bidders an opportunity to bid for broadband PCS licenses. To the contrary, nonminority bidders are free to bid on all broadband PCS licenses and face the prospect of competing against limited minority

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62. Peightal, 26 F.3d at 1561. See also Fullilove, 448 U.S. at 484.

63. Peightal, 26 F.3d at 1561 (quoting Wygant v. Jackson Bd. of Education, 476 U.S. 267, 283 (1986)).

64. Wygant v. Jackson Board of Education, 476 U.S. 267, 282-83 (1986); Peightal, 26 F.3d at 1561-62.

preferences in only one of the six broadband PCS channel blocks. Against the background of no settled rights or expectations in an auction context, this relatively diffuse burden cannot reasonably be said to place an undue hardship on nonminorities.

Thus, CIRI urges the Commission to examine whether its entrepreneurs' block minority preference rules may be justified under the strict scrutiny standard set in Adarand. CIRI recognizes that this calls for the Commission to make a difficult legal and policy decision, and that the Commission may reasonably determine that the risk of prolonged litigation delays offsets the potential benefits of the preferences for minorities. At the same time, however, the Commission has crafted an innovating preference scheme that should be given a chance to succeed. As the cost of broadband PCS licenses grows unexpectedly high, it is important that the Commission attempt to preserve opportunities to participate in the provision of spectrum-based services for a wide variety of responsible applicants.

V. CONCLUSION

For these reasons, CIRI urges the Commission to adopt measures to increase opportunities for responsible small bidders in the remaining auctions, to preserve its Tribal Affiliation Rule, and, if possible, to retain its entrepreneurs' block minority preference provisions.

Respectfully submitted,

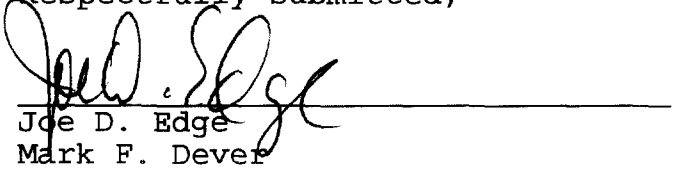

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EXHIBIT 1

PRESENTATION OF
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SUMMARY OF POINTS AND AUTHORITIES REGARDING TRIBAL AFFILIATION RULES IN LIGHT OF ADARAND

I. INTRODUCTION

By orders in August and November 1994, the Commission adopted the Tribal Affiliation Rule, which excludes from attribution for "size" purposes the revenues and assets of any affiliated Alaska Native Corporation or Indian Tribe. 47 C.F.R. § 24.720(l)(11)(i). As the Commission noted at the time, the Tribal Affiliation Rule is a congressionally-mandated element of the Small Business Administration's affiliation rules that were adopted by the FCC. The attribution exception reflects both Congress' express constitutional power to regulate in connection with Indian Tribes and the unique financial character of Native Corporations and Tribes imposed by federal law. As the Commission properly found when adopting the Rule, the unique financial restrictions imposed by law on Native Corporations and Tribes place them at a disadvantage in the Commission's auction vis-a-vis any other private corporation or racial group.

As we show below:

(1) the Tribal Affiliation Rule is constitutional and wholly unaffected by Adarand;

(2) the Tribal Affiliation Rule is an integral part of Congress' regulatory scheme for Native Corporations and Tribes;

(3) repealing the Rule would require further rule making proceedings;

(4) removal of the Rule is not supported by the record before the Commission; and

(5) a departure from the express congressional policy embodied in the Tribal Affiliation Rule (a) would subject the auction process to the substantial risk of delay and (b) would impose unique disadvantages on Native Corporations and Tribes.

II. THE COMMISSION'S TRIBAL AFFILIATION RULE IS NOT RACIAL AND IS NOT AFFECTED BY ADARAND

The "Indian Commerce Clause" of the United States Constitution provides Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Constitution, Article I, § 8, cl. 3. This separate, enumerated constitutional power has long been recognized to provide Congress plenary authority to deal with Native Americans in unique ways.

Nothing in Adarand is relevant to the Commission's Affiliation Rule for Native Corporations and Tribes. The basis for the rule is wholly unrelated to race. Indeed, two days after Adarand was decided, the Supreme Court unanimously reaffirmed one of the many special legal rules (there, a categorical immunity from certain State taxation) applicable to Indian Tribes and their members, but inapplicable to "non-Indians." See Oklahoma Tax Commission v. Chickasaw Nation, 63 U.S.L.W. 4594, 4596 (June 14, 1995).

Thus, the separate constitutional basis for the special treatment of Indian Tribes and Alaska Native Corporations remains beyond serious challenge. Justice Scalia, then writing for the majority of the D.C. Circuit, recognized that: "the constitution itself . . . 'singles Indians out as a proper subject for separate legislation,'" providing the constitutional basis for "rejecting equal protection challenges" to such legislation. United States v. Cohen, 733 F.2d 128, 139 (D.C. Cir. 1984) (en banc); Constitution, Article I, § 8, cl. 3; see also Treaty Concerning the Cession of Russian Possessions in North America, March 30, 1867, Article 3, 15 Stat. 539, 542.

Under long settled law, "Indian tribes are 'domestic dependent nations'" entitled to unique treatment, see, e.g., Oklahoma Tax Com'n v. Potawatomi Indian Tribe, 498 U.S. 505, 509-10 (1991) (Rehnquist, C.J. for a unanimous Court), and subject to special federal regulation, see, e.g., Chugach Alaska Corp. v. Lujan, 915 F.2d 454 (9th Cir. 1990) (affirming Secretary of Interior's regulation of Alaskan village membership).

Thus, "[f]ederal regulation of Indian tribes . . . is governance of once-sovereign political communities; it is not to be viewed as legislation of a '"racial" group consisting of "Indians."'" United States v. Antelope, 430 U.S. 641, 646 (1977) (Burger, C.J., for a unanimous court) (emphasis added).

> The decisions of this [Supreme] Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly

> provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with the Indians.

United States v. Antelope, 430 U.S. at 645 (emphasis added).

The Commission's Tribal Affiliation Rule is not a preference and not subject to equal protection analysis. The rule merely recognizes, and compensates for, the "unique legal constraints" that "Congress has imposed . . . on the way [Native Corporations and Tribes] can utilize their revenues and assets." Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Memorandum Opinion and Order, 10 FCC Rcd 403, 427 (1994) ("Fifth Memorandum Opinion and Order") (emphasis added). The Tribal Affiliation Rule is needed to level the playing field, and is not properly viewed as a "preference" because other persons and legal entities are not similarly situated -- i.e., they do not labor under the "strict alienability restrictions" that preclude Native Corporations "from two of the most important means of raising capital enjoyed by nearly every other corporation: (1) the ability to pledge stock of the company against ordinary borrowings, and (2) the ability to issue new stock or debt securities." Id. at 427-28 (emphasis added). Accordingly, the Tribal Affiliation Rule raises no equal protection issue both because the rule is not based on race, but on the unique status and legal burdens applicable to tribal entities, and because there is no other "similarly situated" group that is treated differently.

Moreover, even express employment preferences for Indians have been unanimously affirmed by the Supreme Court, on the ground that the preference was not for a "discrete racial group," but for "quasi-sovereign tribal entities." Morton v. Mancari, 417 U.S. 535, 554 (1974). Such legislation reflects "the unique legal relationship between the Federal Government and tribal Indians." Id. at 550. Under any different understanding of the law, "the solemn commitment of the Government toward the Indians would be jeopardized." Id. at 552.

Congress has long used its special constitutional powers regarding Indians "to promote the 'goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development.'" Potawatomi Indian Tribe, 498 U.S. at 510.

As is noted below, Congress has used its power to mandate the very Tribal Affiliation Rule here at issue in order to promote tribal economic development. This express congressional statute, which the Commission's Affiliation Rule reflects, is specifically directed not at individual Native Americans, but at legal entities -- Indian Tribes and Alaska Native Corporations. There can be no question but that the creation of, and special rules applicable to, these entities are based not on race, but on a political resolution of issues uniquely consigned to Congress under the Constitution.

Alaska Native Corporations, for example, were created pursuant to an act of Congress as part of the political settlement of long-standing aboriginal disputes in the Alaska Native Claims Settlement Act of 1971 ("ANCSA"). As a result, they are unlike any private corporation. CIRI, for example, is in essence a federally compelled aggregation of 6,700 Alaskan Natives, who have been forced to deposit their aboriginal lands and assets in a "corporation." Recognizing the Native Corporation's unique and close relationship to its owners, Congress made Native Americans' ownership rights inalienable and subject to various restrictions by Federal Law. 43 U.S.C. § 1601, et seq. The effect, recognized by Congress, by the SBA, and by this Commission, has been greatly to restrict CIRI's financial powers and opportunities. See Fifth Memorandum Opinion and Order, 10 FCC Rcd at 428.

In this context, we believe that the Commission's narrowly tailored Tribal Affiliation rules would pass even strict scrutiny. Similarly, we believe the bidding credits accorded to CIRI and other Native Corporations and Tribes would survive review under "strict scrutiny." In Adarand, the Court did not strike down any statute, rule or regulation. It merely required that racial preferences be subjected to "strict scrutiny." But the point is legally irrelevant. Under settled law, regulations specifically aimed at Native Corporations and Tribes are simply not racial and are not subject to "[t]raditional equal protection analysis," regardless of the standard of review. United States v. Decker, 600 F.2d 733, 740 (9th Cir. 1979); Morton v. Mancari, 417 U.S. 535 (1974); United States v. Antelope, supra.

As the Court in Adarand carefully and repeatedly pointed out, equal protection requires strict scrutiny only for preferential treatment based on race. Even within the category of "race," Justice O'Connor's opinion in Adarand made clear that the Court was articulating only a "general rule" which did not affect certain political powers of government, such as the enumerated federal power over immigration. Adarand at 15 (citing Hampton v. Mow Sun Wong, 426 U.S. 88, 100, 101-02 n.21 (1976)). Further, Justice Stevens noted in his opinion that the Supreme Court has long recognized that Congress' special treatment of Native Corporations and Tribes is not based on race, but on their political status as quasi-sovereign entities. See Adarand Constructors, Inc. v. Pena, No. 93-1841, Stevens, J. dissenting, at 4 & n.3 (June 12, 1995). The Adarand majority, which found much to disagree with in Justice Stevens' opinion, did not and could not question this long established proposition.

III. THE TRIBAL AFFILIATION RULE IS AN INTEGRAL AND EXPRESS PART OF A COMPREHENSIVE SET OF RULES PRESCRIBED BY CONGRESS FOR NATIVE CORPORATIONS AND INDIAN TRIBES

The Tribal Affiliation Rule is a congressionally mandated and integral part of the Commission's comprehensive affiliation rules. This attribution rule for Native Corporations and Tribes is the only affiliation exception of its kind approved or required by

Congress. The argument that the exception for Native Corporations and Tribes is or should be analyzed in the same manner as exceptions for racial minorities is incorrect as a matter of constitutional, statutory, and regulatory law and policy.

The Commission's affiliation rules are not an incidental aspect of its size-based bidding scheme. As the Commission concluded, "Affiliation rules are an established and essential element in determining an applicant's compliance with a gross revenues (or other) size standard." Fifth Memorandum Opinion and Order, 10 FCC Rcd at 425.

Because such rules involve complex financial attribution and valuation issues outside the Commission's ordinary competence, the Commission logically looked to and borrowed extensively from the comprehensive affiliation rules established by the Small Business Administration. The Commission's "[a]doption of affiliation rules similar to those used by the SBA is a logical outgrowth of the Commission's decision to impose a gross revenues test for small businesses and to consider SBA's size standards in establishing that test." Id. at 424.

Adoption of the essential affiliation rules without an exception for Native Corporations and Tribes would be directly contrary to express congressional policy. As the Commission noted, "Congress has mandated that the SBA determine the size of a business concern owned by a tribe without regard to the concern's affiliation with the Indian tribe." Id. at 428 (emphasis added). Congressional intent could not be more clear. Congress specifically enacted a statute compelling the SBA to exclude the revenues and assets of any affiliated Native Corporation or Tribe. 15 U.S.C. § 636(j)(10)(J)(ii); see also 25 U.S.C. § 450b(e) (defining Indian Tribe as including "any Alaska Native village or regional . . . corporation" established pursuant to the ANCSA). As the Supreme Court has noted in other contexts, such an express statutory "exemption reveals a clear congressional recognition . . . of the unique legal status of tribal and reservation-based activities." Morton v. Mancari, 417 U.S. at 545-46.

Pursuant to this Congressional directive, the SBA adopted an affiliation exception for Native Corporations and Tribes. This Commission adopted the same Tribal Affiliation Rule, noting that this "mirrors this congressional mandate." Fifth Memorandum Opinion and Order, 10 FCC Rcd at 428. See also Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Order on Reconsideration, 9 FCC Rcd 4493, 4494 (1994) ("Order on Reconsideration") ("adoption of an affiliation exemption for Indian tribes and Alaska Native Corporations . . . is consistent with these other Federal policies").

Congress has chosen to regulate Native Corporations and Tribes by means of a complex set of rules. The Tribal Affiliation Rule is one integral piece of that set. In defining these entities and promoting the most basic policies underlying Congressional

treatment of Native Americans, Congress has spelled out a specific rule applicable only to Native Corporations and Tribes. Congress has recognized that not requiring a special affiliation rule applicable to Native Corporations and Tribes would treat these entities inequitably.

Finally, the "inequity" argument has been expressly and properly resolved by the Commission. As the Commission noted, when Congress created CIRI, it provided by statute that "the stock held by Native corporations is subject to strict alienability restrictions -- it cannot be sold, pledged, mortgaged or otherwise encumbered." Id. at 427-28. These restrictions have the effect, as the Commission properly found, of "preclud[ing]" Native Corporations "from two of the most important means of raising capital enjoyed by virtually every other corporation": pledging stock, and issuing new stock or debt securities. Id. at 428 (emphasis added). As the Commission noted, "Congress has not placed similar legal constraints on the assets and revenues of enterprises owned by any other minority group." Id. (emphasis added). Thus, the Commission properly found "that such legal restraints on assets and revenues place Indian tribes at a disadvantage vis-a-vis other minority groups with similar revenues and assets." Id. (emphasis added).

A recognition of the special disadvantages imposed on Native Corporations and Tribes by Congress, and the adoption of a Tribal Affiliation Rule specifically enacted by Congress, are required by the undisputed facts before this Commission and by express Congressional policy. Congress intended, in a domain uniquely within its power and discretion, to provide an exception for Indian Tribes and Corporations based on their unique character. We do not believe that any court would enjoin the Commission, even on a temporary basis, from maintaining an express statutory scheme which is not even subject to equal protection analysis. We are confident, on the other hand, that a failure to comply with this congressional policy would create a serious risk that the Commission would be enjoined.

IV. REMOVAL OF THE TRIBAL AFFILIATION RULE WOULD REQUIRE A RULE MAKING PROCEEDING

After lengthy rule making procedures, the Commission has properly adopted the Tribal Affiliation Rule previously adopted by the SBA pursuant to express Congressional mandate. The Commission cannot now reverse course and eliminate this Rule without appropriate rule making proceedings.

"[T]he APA expressly contemplates that notice and an opportunity to comment will be provided prior to agency decisions to repeal a rule." Consumer Energy Council of Am. v. F.E.R.C., 673 F.2d 425, 446 (D.C. Cir. 1982) (emphasis added), aff'd, 463 U.S. 1216 (1983); see also Citibank, Fed. Sav. Bank v. F.D.I.C., 836 F. Supp. 3, 7 (D.D.C. 1993) ("[N]otice and comment procedures which apply to the creation of new regulations are

equally applicable to the repeal of existing regulations"); Nat'l Wildlife Fed'n v. Watt, 571 F. Supp. 1145, 1156-58 (D.D.C. 1983) (noting that abandonment of regulation by agency based only on informal, ex parte opinions that provision was unconstitutional would violate APA notice and comment rules); 5 U.S.C. § 551(5) ("rule making" includes "repealing a rule").

Moreover, it is well established that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (emphasis added). This even greater "reasoned analysis" for rescinding a rule must be based on the record, after notice and opportunity to comment. Id. at 43-44. For the reasons noted below, we do not believe the Agency can meet this standard.

V. REMOVAL OF THE TRIBAL AFFILIATION RULE IS NOT AND CANNOT BE SUPPORTED BY THE RECORD

A. There is No Basis for a Departure from Express Congressional Policy Providing an Affiliation Exception Solely for Native Corporations and Tribes Based on their Unique Status

Moreover, nothing in the legal or factual framework relied upon by the Commission in adopting the Tribal Affiliation Rule has been changed since the Commission issued its order. The express constitutional provisions concerning congressional power in dealing with Indian Tribes, ANCSA, and the applicable Congressional enactment requiring a Tribal Affiliation exception from the SBA rules, all remain in place. The ANCSA restrictions on alienation which disadvantage Native Corporations vis-a-vis private corporations and other minority groups remain in place.

In adopting the SBA's tribal affiliation rules, the Commission did not rely on the affirmative action cases or policies which have been overruled by Adarand; those decisions, like Adarand itself, remain irrelevant to the Tribal Affiliation Rule.

The Commission adopted the Tribal Affiliation Rule prior to, and independently of, its subsequent adoption of an affiliation exception for minority groups. These two sets of rules were never linked, and given their independent congressional and constitutional foundations, cannot be linked. The possibility that the Commission will now eliminate the minority bidding credits in light of Adarand provides no rational basis for also eliminating the earlier, independent, congressionally-mandated Tribal Affiliation exception.

B. Removal of the Tribal Affiliation Rule Would Require Its Replacement with a Complex Set of Accounting Rules Addressing the Unique Financial Attributes of Native Corporations and Tribes

Native Corporations and Tribes are subject to highly complex, diverse and unique limitations on their assets and revenues. Many tribal lands are inalienable and/or held in trust by the federal government and/or are subject to federal regulation in a manner quite foreign to ordinary ownership. Federal law imposes similar restrictions on revenues. CIRI, just to mention one, is required by federal law to distribute most of its revenues from subsurface resources to other Native Corporations and to certain shareholders. See 43 U.S.C. § 1606(i) and (j). The accounting complexities for Tribal balance sheets (if they even exist) would be immense. Quite apart from the restrictions on the alienability of CIRI's stock, CIRI's assets and revenues, like those of other Native Corporations and Tribes, give CIRI far less financial power than superficially similar revenues and assets in the hands of private corporations.

Thus, even assuming that the congressional policy against attributing Native Corporation and Tribal assets and revenues to affiliated corporations were disregarded, any attempt to create attribution and valuation rules for Native Corporations and Tribes would involve complex accounting and legal issues and would take a substantial and de novo rule making effort. Attribution rules that did not take account of these diverse differences in the financial character of Native Corporations and Tribes would disadvantage Native Corporations and Tribes as compared to all other applicants and would be arbitrary and capricious.

VI. REMOVAL OF THE TRIBAL AFFILIATION RULE WOULD EXPOSE THE C BLOCK AUCTION TO THE SUBSTANTIAL RISK OF A PROLONGED STAY

A. Removal of the Tribal Affiliation Rules Would Violate The Principal Of LaRose and Expose The C Block Auction to a Stay

In borrowing heavily from the SBA affiliation rules, the Commission properly followed the guidance of LaRose v. F.C.C., 494 F.2d 1145, 1147 (D.C. Cir. 1974). See Order on Reconsideration, 9 FCC Rcd at 4494 n.11. Administrative agencies are "required to consider other federal policies, not unique to their particular . . . expertise, when fulfilling their mandate to assure that their regulatees operate in the public interest." LaRose, 494 F.2d at 1147 n.2. In LaRose, finding that the Commission had "fail[ed] to recognize the constraints imposed by appellant's status" under applicable bankruptcy law, the Court reversed the Commission's order. Id. at 1149-50; see also Storer Communications, Inc. v. F.C.C., 763 F.2d 436, 443 (the Commission "has a duty" to attempt to implement the

Communications Act "in a manner as consistent as possible with corporate and federal security laws' protection of shareholders' rights").

Any failure to "recognize the constraints imposed by" ANCSA and the express congressional policy of an attribution exception for Native Corporations and Tribes would be inconsistent with the lessons of LaRose and would subject the Commission's order to reversal. Litigation over this issue would not only be likely to be decided in CIRI's favor, it would create costs and delays which CIRI continues to join with the Commission in hoping to avoid.

B. Removal of the Tribal Affiliation Rule Would Constitute Overt and Unlawful Discrimination against Native Americans

Finally, eliminating the Tribal Affiliation Rule would not eliminate discrimination or create "neutral" rules or an "even" playing field. Such an action would in fact single out Alaska Natives and Native Americans for uniquely harsh treatment. It would result in the very sort of discrimination against Native Corporations and Tribes which Congress has expressly sought to avoid.

Under the current affiliation rules, for example, an unlimited number of wealthy persons (of any race) can combine their resources to form a single DE. As long as these persons avoid any corporate or legal relationship among themselves other than their participation in the DE, their combined assets, no matter how large, will not be aggregated to determine their eligibility to bid. In the absence of the Tribal Affiliation Rule, Alaskan Natives' assets would be aggregated artificially under the same Commission regulations and they would be forbidden even to participate in the auction. Without the Tribal Affiliation Rule, Alaska Native and Native American tribal members would be discriminated against because of the business structure imposed on them by Congress. Congress enacted the attribution rule to prevent just such results.